STATE OF ILLINOIS

HUMAN RIGHTS COMMISSION

IN THE MATTER OF:	)	
	)	
JESSICA STONE,	)	
	)	
Complainant,	)	
	)	
and	)	CHARGE NO: 1998SF0645
	)	EEOC NO: 21B981680
D & B REFUSE SERVICE, INC.,	)	ALS NO: S-10976
	)	
Respondent.	)	

RECOMMENDED ORDER AND DECISION

This matter is ready for a Recommended Order and Decision pursuant to the Illinois Human Rights Act (775 ILCS 5/1-101 et seq.). A public hearing was held before me in Springfield, Illinois on April 2, 3, and 4, 2001. The parties have filed their post-hearing briefs. Respondent also moved to reopen the record for purposes of submitting additional evidence, and Complainant has filed a response.

Contentions of the Parties

Complainant asserts that Respondent failed to rehire her to a position of a garbage truck driver on account of her sex. Respondent contends that Complainant failed to establish a *prima facie* case of sex discrimination. It alternatively submits that Complainant was not rehired to her former position as a garbage truck driver for reasons unrelated to her gender.

Findings of Fact

Based upon the record in this matter, I make the following findings of fact:

1. For a period of at least three years before August 1, 1996, Complainant, a female, worked for G & G Refuse, as a truck driver responsible for the pickup and dumping of garbage from both commercial and residential customers. At some point during this period Complainant was given the job title of route manager which required Complainant to

spend the first hour of her workday ensuring that all scheduled workers went out on their routes. Complainant then spent the rest of her workday going out in her garbage truck and running her route.

2. Prior to August 1, 1996, G & G employed Jim Rardin, a male, as a business manager. In this capacity, Rardin did not have a supervisory role over Complainant or any of the garbage truck drivers, but rather was responsible for figuring the payroll and working on the garbage route sheets.

3. On August 1, 1996, Respondent, D & B Refuse Service, Inc., purchased the assets of G & G Refuse. At that time, Steve Loveall, president and one of the owners of Respondent, assigned James Rardin to the position of operations manager. As operations manager, Rardin supervised all of the garbage truck drivers, with the power to hire, fire, and schedule these employees.

4. When Respondent took over the garbage collection routes of G & G Refuse, Respondent hired all of the existing G & G Refuse employees, including Complainant, on a probationary basis. However, Loveall did not retain Complainant's route manager position.

5. On August 1, 1996, Complainant approached Rardin after an office meeting and told him that he was not qualified for the operations manager position, and that she should have been hired as the operations manager.

6. On August 19, 1996, Complainant completed a written application for Respondent and was hired as a garbage truck driver. At this time Complainant was given a rural route servicing residential customers. While Complainant's rural route was a five-day route, Complainant, as well as every garbage truck driver, was expected to work every Saturday to pick up missed sites, deliver containers or barrels or perform other duties.

7. At the time of Complainant's hire, Respondent also hired Wes Turner, who was Complainant's husband and a prior G & G Refuse employee. Turner also drove a garbage truck, but was assigned a different route that serviced commercial customers.

8. Periodically, from August 19, 1996 to November 2, 1996, Complainant would object to a direction given by Rardin or challenge his authority to assign her a task by uttering phrases such as “fuck you”, “cock-sucker”, “son-of-a-bitch”, “fucking prick”, and “bastard”. Complainant would utter these phrases in Rardin’s presence and over the company radio system. At all times pertinent to this Complaint, all of Respondent’s Sullivan and Mattoon area employees could hear conversations occurring over the radio system.

9. Prior to the middle of October 1996, Loveall heard over the radio on one or two occasions a discussion between Rardin and Complainant. During these discussions, Rardin directed Complainant to go back to a certain customer on Complainant’s rural route, and Complainant, after calling Rardin a “son-of-a-bitch”, told Rardin that she was not going to do it.

10. Shortly after the second instance of hearing Complainant telling Rardin over the radio that she was not going to follow his orders, Loveall had a meeting with Rardin. During this meeting, Loveall instructed Rardin that he either had to bring Complainant under control or make some kind of change. Loveall also told Rardin that if he could not solve the problem with Complainant, he would find someone who could.

11. From August 1, 1996 to November 4, 1996, Complainant was scheduled to work 80 days. Out of the 80 workdays, Complainant missed a total of 18 days and was tardy an additional six days.

12. On October 30, 31, and November 1, 1996, Complainant failed to come into work without notifying Respondent of the reasons for failing to come into work. Turner worked all three of these days.

13. On Saturday, November 2, 1996, both Complainant and Turner worked at Respondent.

14. By November 2, 1996, Rardin had decided in conjunction with Loveall that Complainant should be terminated due to the fact that Complainant had three unexcused absences during the past week and had displayed an insubordinate attitude.

15. On Monday, November 4, 1996, Complainant and Turner came to work as scheduled. At the start of the day, Rardin called Complainant into the office and told her that she was not needed anymore, but that Turner was needed to run his route. While Rardin told Complainant that she was laid off, he intended his action to be an outright termination. Although Turner completed his route on that day, Turner failed to show up for work on the following two days.

16. On November 7, 1996, Rardin told Turner that his services were no longer needed. Rardin did not further elaborate his reasons for the dismissal and did not turn in the paperwork for Turner's dismissal because he believed that Turner was missing work out of sympathy for Complainant.

17. Approximately two weeks later, Rardin went to Complainant and Turner's home to ask Turner whether he wanted his job back at Respondent. Rardin believed that, outside of Turner's recent absence after Complainant's termination, Turner had been one of his better drivers, and that Turner would be a good driver if he improved his attendance and attitude. Rardin offered Turner his job back conditioned on these improvements. Turner accepted Rardin's offer and worked at Respondent until the spring of 2000.

18. After November of 1996 and through April of 1998, Respondent periodically advertised for garbage truck drivers and riders in the local newspaper. During this time period, Complainant asked Rardin if Respondent had openings for garbage truck driver positions. On these occasions, Rardin lied to Complainant by telling her that the positions were either filled or that Respondent was no longer looking for drivers because he did not intend to hire Complainant due to his past experience with Complainant, and because he did not want to risk an obscenity-laced tirade if he told her the truth.

19. Between November of 1996 and March of 1998, Rardin hired Complainant as a rider on a garbage truck on three different occasions when Rardin needed temporary help. On each occasion, Complainant worked only a single day.

20. On one occasion between November of 1996 and March of 1998, Turner asked Rardin for an application on behalf of Complainant. Rardin refused Turner's request.

21. Between September 17, 1997 to March 16, 1998, when Complainant filed her Charge of Discrimination against Respondent, Respondent hired Andrew Hardin and Matthew Decker, both males, as drivers. Complainant had sought employment from Respondent during this same time frame.

22. On April 24, 1998, Complainant went to Respondent and filled out an application for a driver position. Rardin did not process the application until sometime after May 1, 1998 because Complainant indicated in her application that she could not start work until May 11, 1998, and Rardin knew at the time that Respondent had agreed to sell its assets in the garbage collection operations to American Disposal Services, Inc.

23. On May 1, 1998, Respondent D & B Refuse Service sold its assets to American Disposal Services Inc. At that time, Rardin became an employee of American Disposal Services, Inc. and retained the same position that he had with Respondent. At this same time, Loveall rendered managerial advice to Rardin with respect to Respondent's former garbage collection operations as a consultant for American Disposal Services, Inc.

24. On October 13, 1998, Complainant filed a charge of discrimination against American Disposal Services, Inc., alleging that American Disposal Services Inc. failed to hire her as a garbage truck driver on account of her sex after applying on April 24, 1998 and June 15, 1998. The Department ultimately issued a lack of substantial evidence finding on this charge, and Complainant's Request for Review was ultimately denied.

Conclusions of Law

1. Complainant is an "employee" as that term is defined under the Human Rights Act.

2. Respondent is an "employer" as that term is defined under the Human Rights Act and was subject to the provisions of the Human Rights Act.

3. Once a respondent articulates a legitimate, non-discriminatory reason for its adverse action, the absence of a *prima facie* case of discrimination is no longer important. Rather, the focus shifts to whether the complainant has proved by a preponderance of the evidence that the articulated reason was a pretext for sex discrimination.

4. Respondent has articulated a legitimate, non-discriminatory reason for its decision not to rehire Complainant.

5. Complainant has failed to prove by a preponderance of the evidence that the reason given by Respondent for its treatment of Complainant is a pretext for sex discrimination.

Determination

Complainant failed to establish by a preponderance of the evidence that Respondent violated section 2-102(A) of the Human Rights Act (775 ILCS §5/2-102(A)) when it failed to rehire Complainant as a garbage truck driver.

Discussion

The issue in this case is whether Respondent discriminated against Complainant when it refused to rehire Complainant during a 180-day time period prior to March 16, 1998, when Complainant filed her Charge of Discrimination. Complainant asserts that Respondent treated males, including her husband, more favorably. She also maintained that Respondent had an anti-female animosity because she was the only female garbage truck driver in the workplace. However, after examining the record and the briefs in this matter, I agree with

Respondent that its refusal to rehire Complainant stems from her record of gross insubordination and absenteeism, rather than the fact that Complainant is a woman.

Generally, in cases alleging disparate treatment based upon an employee's sex, the Commission and the courts have applied a three-step analysis to determine whether there has been a violation of the Illinois Human Rights Act. (See, for example, **Townsell and Illinois Department of Labor**, 43 Ill. HRC Rep. 198 (1988), and **Foley v. Illinois Human Rights Commission**, 165 Ill.App.3d 594, 519 N.E.2d 129, 116 Ill.Dec. 539 (5th Dist. 1988).) Under this approach, the complainant must first establish a *prima facie* case of unlawful discrimination by a preponderance of the evidence. The burden shifts to the respondent to articulate a legitimate, non-discriminatory reason for any materially adverse action taken against the complainant. If the respondent is successful in its articulation, the presumption of unlawful discrimination is no longer present in the case (see, **Texas Department of Community Affairs v. Burdine**, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981)), and the complainant is required to prove by a preponderance of the evidence that the respondent's articulated, non-discriminatory reason is a pretext for unlawful discrimination. The latter requirement merges with the complainant's ultimate burden of proving that the respondent discriminated unlawfully against the complainant.

Complainant asserts that she has established a *prima facie* case of sex discrimination using both the direct and indirect method. Specifically, she contends that Rardin's animosity towards women was demonstrated some three months after her November 1996 lay-off when he told her during a conversation in the parking lot of a local grocery store that the reason she was laid off was because she was a woman. However, given Rardin's history of non-confrontation with Complainant, as well as Complainant's assertion that Respondent had a history of obfuscating the true reasons for her lay-off/termination, I do not believe that the parking lot conversation ever occurred since I find it highly unlikely that Rardin would have suddenly told Complainant that her gender was the real reason for her termination.

Complainant fares better in her attempt to establish a *prima facie* case of discrimination via the indirect method. Specifically, she notes that she made several inquiries about garbage truck drivers during the 180-day period preceding the filing of her Charge of Discrimination, that she possessed the qualifications for such a position in view of her commercial driver's license, and that Respondent hired at least two male garbage truck drivers during this period. These facts are sufficient to establish a *prima facie* case of discrimination, especially where the Appellate Court has found that job performance is not an essential to establish a discrimination claim. (See, **ISS International Service, Inc. v. Human Rights Commission**, 272 Ill.App.3d 969, 651 N.E.2d 592 (1st Dist. 1995).) Indeed, Rardin's willingness to hire Complainant for temporary jobs subsequent to her lay-off cuts against any argument that Complainant was incapable of performing the garbage truck driver's position.

Respondent's witnesses, though, testified that testified that Complainant was not rehired because of her prior attendance problems (especially in refusing to work on Saturdays) and her insubordinate attitude towards Rardin. This articulation, on its face, provides me with a neutral, non-discriminatory reason for Complainant's treatment. Thus, the only real question remaining in this case is whether Complainant has shown by a preponderance of the evidence that Respondent's articulation is a pretext for sex discrimination.

In this regard, Complainant has not shown that its reasons for not rehiring Complainant during the 180-day period prior to the filing of her Charge of Discrimination, i.e., Complainant's absenteeism and insubordination, were unworthy of belief or were otherwise pretexts for sex discrimination. Specifically, Loveall, Rardin and others testified to Complainant's absences from the workplace and to incidents in which Complainant refused Rardin's direct orders and subjected Rardin to obscenity-laced outbursts. Complainant offered no rebuttal to the factual basis for these assertions, and more important, failed to

provide any evidence to establish that Rardin hired male garbage truck drivers with similar absenteeism and insubordinate attitudes.[1]

During the public hearing, an issue arose as to whether foul language was an "industry norm" among garbage truck drivers in the waste industry such that an argument could be made that Complainant was terminated for conduct that was regularly practiced by other garbage truck drivers. (See, for example, **Hawley and Rosewood Care Center of Peoria**, ___ Ill HRC Rep. ___ (1993SF0536, December 19, 1997) where a successful pretext argument was made by comparing complainant's alleged infraction with industry practice and noting the difficulty in obtaining replacement employees for complainant's position.) Indeed, Loveall conceded that the waste industry typically deals with a "coarse group" of individuals who use coarse language among themselves, and that Respondent had a difficult time retaining reliable garbage truck drivers. However, Loveall further testified without contradiction that while he tolerated coarse language among his truck drivers, he did not tolerate coarse language directed at a supervisor by a truck driver since it demonstrated a lack of respect and eroded management's authority. Accordingly, Complainant loses on her pretext argument since she was unable to show either that Respondent tolerated obscenity-laced affronts to management by its male garbage truck drivers, or that it hired garbage truck drivers with similar histories of insubordination towards their supervisors.

Complainant also cites to several inconsistencies with respect to the circumstances surrounding her November, 1996 lay-off/termination, as well as the dismissal and eventual rehire of Turner, and argues that these inconsistencies demonstrate that Respondent was lying about the real reason for its refusal to rehire her. Indeed, the record shows that Respondent gave to the Department of Human Rights inconsistent dates and reasons for

[1] Complainant did herself no favor by failing to appear at the rebuttal stage of the public hearing. Not only did Complainant's absence from the public hearing highlight Respondent's claim that Complainant had an absenteeism problem at work, but it also prevented her from refuting any claims by Respondent that she was insubordinate at the workplace.

Turner's dismissal, as well as inconsistent versions as to whether Turner ever "applied" for his old position in November of 1996 and whether Turner ever had an absenteeism problem. Yet these purported "lies" about remote and collateral incidents are not particularly helpful to Complainant's pretext argument because: (1) the Complaint in this case concerns actions taken by Respondent from September 17, 1997 through March 16, 1998; (2) the above inconsistencies do not pertain to incidents occurring within this time frame; and (3) the inconsistencies still do not provide me with any basis to question the existence of either Complainant's absenteeism, her insubordination, or Loveall's dislike for employees who are either insubordinate or absent from work.

In any event, the inconsistencies have importance here only with respect to Complainant's claim that Respondent actually treated males, including her husband, more favorably than females. Specifically, Complainant asserts that Turner received more favorable treatment since Rardin rehired Turner without requiring that he file an application, while he rebuffed her oral requests for a garbage truck driver job, lied to her about the existence of any openings and on one occasion literally refused to provide her with an application. Turner, though, is not a valid comparative since although I agree that he received favorable treatment from Rardin, Complainant cannot show that Turner had an equally bad absenteeism or insubordinate attitude record. Thus, from this perspective, the lies told to Complainant about the lack of openings were consistent with Rardin's explanation that he did not want to have Complainant in the workplace, and that he and did not wish to risk another obscenity-laced tirade from Complainant by telling her the truth.

Complainant further contends that the failure of Rardin to document various incidents of insubordination in her personnel file indicates that the incidents of insubordination were not based on fact. However, the failure of Rardin to document Complainant's incidents of insubordination is not evidence of discrimination where some of Complainant's co-workers bolstered Rardin's claim that Complainant adamantly refused to follow his orders on certain

occasions, and where Complainant did not otherwise show that Rardin placed written documentation of incidents in other employee's personnel files.

Similarly, Complainant's attempt to show Respondent's anti-female bias by noting that she was the only female garbage truck driver is equally without merit. Under certain circumstances statistical relationships within a workplace can provide some evidence of a pattern or practice of discriminatory conduct. However, Complainant failed to provide any evidence regarding the number of female applicants seeking positions as garbage truck drivers, or Respondent's rate of rejecting qualified female applicants. Indeed, the only evidence regarding the applicable female pool of applicants came from Rardin who indicated that he was aware of only two female applicants for garbage truck driver positions, and that these female applicants did not respond to his attempts to follow-up with their applications. Thus, while it is true that the record shows that Rardin did not hire any female garbage truck drivers after Complainant's lay-off, this "pool" of applicants is too small to make any valid finding that Respondent had a practice of denying employment to female applicants. See also **Carter and City of Springfield**, ___ Ill. HRC Rep. ___ (1979SF0023, August 29, 1999) where the Commission made a similar observation in the context of a discriminatory impact claim.

Finally, before leaving this pretext issue, a comment should be made about Rardin's May 12, 1998 telephone call to Western Temporary Service, and its relevance to the instant Complaint. According to Complainant, Rardin and Loveall lied on the witness stand when they asserted that they called Western and learned about her absenteeism problems with the employer-clients of Western, and that they based in part their decision to not rehire her in May of 1998 on the information obtained from this telephone call. The main problem with Complainant's argument is the fact that the decision in May of 1998 not to rehire Complainant took place outside the contours of the subject Charge of Discrimination which was filed on March 16, 1998 and concerned alleged conduct by Respondent that took place

between September 17, 1997 and March 16, 1998. Too, where Respondent had sold its garbage removal operations on April 30, 1998 to American Disposal Services, Inc., it would seem that Respondent's potential liability with respect to the actions taken by Loveall and Rardin ended on April 30, 1998. In any event, the record shows that the Department of Human Rights issued a lack of substantial evidence finding with respect to Complainant's separate Charge of Discrimination (No. 1992CF0902) alleging sex discrimination arising out of her April 24, 1998 written application.[2]

Recommendation

For all of the above reasons, it is recommended that the Complaint and underlying Charge of Discrimination of Jessica Stone be dismissed with prejudice.

HUMAN RIGHTS COMMISSION

BY: _____
MICHAEL R. ROBINSON
Administrative Law Judge
Administrative Law Section

ENTERED THE 13TH DAY OF MARCH, 2002

[2] Respondent has filed a motion seeking to reopen the record to reflect the fact that the EEOC issued a Dismissal and Notice of Rights to plaintiff that stemmed from Complainant's allegations with respect to her April 24, 1998 written application. I will deny this motion since it is unclear how a rejection by the EEOC of Complainant's claim under federal law has any dispositive effect on this state law claim that concerns different allegations over a different time period (i.e., September 17, 1997 through March 16, 1998).